



U.S. Department
of Transportation

**Research and Special
Programs Administration**

Office of the
Chief Counsel

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NOTICE OF PROBABLE VIOLATION

RSPA Ref. No. 04-602-CR-EA

Date Issued: DEC 28 2004

Respondent: New England Ski and Scuba, LLC
a/k/a and d/b/a K&B Enterprises
c/o Steven L. Seligman, Esq.
Katz & Seligman
130 Washington Street
Hartford, Connecticut 06106

No. of Alleged Violations: 4

Maximum Possible Assessment: \$130,000

Total Proposed Assessment: \$30,640, after a \$7,410 reduction for corrective actions.

The Office of the Chief Counsel of the Research and Special Programs Administration (RSPA) alleges that you (the Respondent named above) have violated certain provisions of Federal hazardous materials transportation law, 49 U.S.C. § 5101 *et seq.*, and/or the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180. The specific allegations are contained in Addendum A to this Notice.

What are the maximum and minimum civil penalties that RSPA can assess? Federal law sets a maximum civil penalty of \$32,500 and a minimum civil penalty of \$275 for each violation of Federal hazardous materials transportation law or the HMR. Each day of a continuing violation by a shipper or transporter of hazardous material constitutes a separate violation for which the maximum penalty may be imposed. 49 U.S.C. § 5123(a)(2).

What factors does RSPA consider when proposing and assessing a civil penalty? Federal law requires RSPA to consider certain factors when proposing and assessing a civil penalty for a violation of Federal hazardous materials transportation law or the HMR. These factors, which include corrective action you take to attain and ensure ongoing compliance with the HMR, are in Addendum B to this Notice.

How do I respond? You may respond to this Notice in any of three ways:

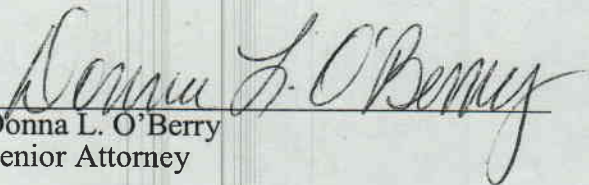
- (1) pay the proposed assessment;

- (2) send an informal response, which can include a request for an informal conference; or
- (3) request a formal hearing.

Details on these three options are provided in Addendum B to this Notice and also on the home page of RSPA's Office of the Chief Counsel, at "<http://rspa-atty.dot.gov>". RSPA's procedures for assessing civil penalties and imposing compliance orders are explained in Sections 107.307 through 107.331 of 49 C.F.R.

When is my response due? You must respond to this Notice within 30 days of the date you receive it. You are encouraged to submit your response by email or fax when possible. I may extend the 30-day period for your response if you ask for an extension, and show good cause, within the original 30-day period.

What happens if I fail to respond? If you fail to respond to this Notice within thirty (30) days of receiving it (or by the end of any extension), you will waive your right to contest the allegations made in Addendum A to this Notice, and the Chief Counsel may find the facts alleged in this Notice and assess an appropriate civil penalty.


Donna L. O'Berry
Senior Attorney

Enclosures: Addendum A
Addendum B
Addendum C
Case Exhibits

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

FACTS ALREADY CONSIDERED (UNDER 49 C.F.R. § 107.331)
IN SETTING PROPOSED PENALTIES

Corrective Action

An important purpose of RSPA's enforcement program is to bring the regulated community into compliance with the HMR, and to promote ongoing efforts by that community to maintain compliance. Documented evidence of action taken to correct violations and ensure that they do not recur is considered by RSPA under 49 C.F.R. § 107.331(g) in determining the final penalty assessment.

In July 26, August 9, and August 23, 2004 correspondence, Respondent described the corrective measures it took following the hazardous materials safety compliance inspection to correct the violations alleged below and to prevent future violations of the HMR. The following is a summary of Respondent's corrective actions.

Probable Violations No. 1-3 - Respondent provided written notification to several customers that cylinders it had requalified for the customers since January 2003 should be retested. In addition, Respondent surrendered its RIN on May 13, 2004. Finally, Respondent refunded money to one customer that it had charged for alleged cylinder requalification. Based on the corrective action submitted, the proposed penalty has been reduced by 20% for each of these probable violations.

Probable Violation No. 4 - Although Respondent surrendered its RIN, it appears that Respondent still has employees who perform functions covered under the HMR. Respondent has not provided any indication that these employees have been trained, therefore, no mitigation is warranted for this probable violation.

Financial Status

Under 49 C.F.R. § 107.331(e) and (f), the proposed penalty may be reduced if Respondent demonstrates that it is unable to pay that penalty, or if payment of the proposed penalty would affect Respondent's ability to continue in business. Respondent's poor financial condition may be a basis for reducing the proposed penalty; a healthy financial condition is not a basis for increasing the penalty.

At present, RSPA has no information showing that Respondent is unable to pay the proposed penalty, or that payment of the penalty will affect its ability to continue in business. If Respondent wishes its financial condition to be considered in assessing a penalty for the violations alleged in this Notice, it can provide current financial information (e.g. a copy of Respondent's most recent tax return, a current balance sheet or other evidence of its assets and liabilities).

Prior Violations of the Hazardous Materials Regulations

As 49 C.F.R. § 107.331(d) provides, RSPA increases proposed penalties when Respondent has committed a prior violation of the Federal hazardous materials transportation law or the HMR within the last six years, as determined through a civil penalty case, criminal case, or ticketing process. RSPA's records do not contain any prior violations within the last six years by Respondent, and no prior violations have been considered in determining the proposed assessment for the violations in this Notice.

SPECIFIC VIOLATIONS ALLEGED

Violation No. - 1

Summary of Violation

Representing, marking and certifying DOT specification cylinders as having been successfully retested in accordance with the HMR, when the cylinders had not actually been tested, in violation of 49 C.F.R. §§ 171.2(c), 180.3(a), 180.205(b), 180.205(c) and 180.205(g).

Evidence

See the attached inspection/investigation report at pages 3-6, and the exhibits included with that report.

Maximum Possible Assessment: \$32,500

Proposed Assessment: \$26,000, after a \$6,500 reduction for corrective actions.

Violation No. - 2

Summary of Violation

Representing, marking, and certifying DOT specification cylinders as having been successfully retested in accordance with the HMR, when Respondent failed to confirm that the pressure-indicating device on its retest apparatus was accurate to within 500 psig of the actual test pressure of the cylinders being tested that day, in violation of 49 C.F.R. §§ 171.2(c) and 180.205(g)(3).

Evidence

See the attached inspection/investigation report at pages 7-8, and the exhibits included with that report.

Maximum Possible Assessment: \$32,500

Proposed Assessment: \$2,920, after a \$730 reduction for corrective actions.

Violation No. - 3

Summary of Violation

Representing, certifying and marking DOT specification and exemption cylinders as having been successfully retested in accordance with the HMR, without maintaining copies of applicable DOT exemptions and Compressed Gas Association (CGA) pamphlets, in violation of 49 C.F.R. §§ 171.2(c), 180.215(a)(5) and 180.215(a)(6).

Evidence

See the attached inspection/investigation report at pages 9-10, and the exhibits included with that report.

Maximum Possible Assessment: \$32,500

Proposed Assessment: \$720, after a \$180 reduction for corrective actions.

Violation No. - 4

Summary of Violation

Allowing employees to perform a function subject to the HMR, when the employees were not trained as required and records of training were not created and retained, in violation of 49 C.F.R. §§ 172.702(b), 172.704(a) and 172.704(d).

Evidence

See the attached inspection/investigation report at page 11, and the exhibits included with that report.

Maximum Possible Assessment: \$32,500

Proposed Assessment: \$1,000

TOTAL MAXIMUM POSSIBLE ASSESSMENT: \$130,000

TOTAL PROPOSED ASSESSMENT: \$30,640, after \$7,410 reduction for corrective actions.